death without issue, it would seem then that the surviving husband could not renounce the will and take all of the personal estate as if she had died intestate.

Fortunately the matter was brought to the attention of the Legislature, and as a result, § 5276 appears in the 1920 Acts of Assembly in amended form as follows:

> "When any provision for a husband or wife is made in the consort's will, the survivor may, within one year from the time of the admission of the will to probate, renounce such provision. * * * If such renunciation be made, or if no provision for the surviving husband or wife be made in the will of the decedent, the surviving consort shall, if the decedent left surviving issue, etc., * * *; or if no such issue survive, the surviving consort shall have one half of the aforesaid surplus; otherwise the surviving consort shall have no more of the said surplus than is given him or her by the will."

EVIDENCE—WRITTEN INSTRUMENTS—ADMISSIBILITY OF CONTEMPORANEOUS PAROL AGREEMENT.—It is an elementary rule of law that a contemporaneous parol agreement inconsistent with the terms of a written contract cannot be introduced to vary or contradict the terms of the contract, except in case of fraud or mistake. The rule is rigorously applied in Virginia to the case of an oral agreement contemporaneous with the execution of a promissory note providing for payment by other means than money.[1] In the case cited, the maker of the note wished to prove the full performance of a contemporaneous oral agreement providing that the payee's enjoyment of the rents and profits accruing from his (the maker's) estate during the same period should satisfy the note. The evidence was held inadmissible, the court saying:

> "One of the essential attributes of a negotiable note is that it is payable in money. * * * The notes in this case are described as negotiable in the bill, and upon their face are plainly payable in money.
>
> "The alleged oral agreement embodied an undertaking on the part of the maker of the notes * * * which is in direct conflict with the manner of payment provided for therein. By the notes they agreed to pay in money; by the parol contract they were not to pay in money but in labor."

No earlier Virginia case is to be found directly in point, but

[1] Rector *v.* Hancock (Va.), 102 S. E. 663.

the court cites several analogous cases. In *Towner* v. *Lucas*,[2] evidence was offered to show that the appellant orally agreed not to sue the appellee upon his signature to a bond and to give written indemnity against the bond, was held inadmissible. In *Slaughter* v. *Smither*,[3] the appellee had contracted in writing to run the appellant's drug store, and offered evidence to prove the appellant's breach of a contemporaneous oral agreement that he would not himself set up another store. The evidence was not admitted. Again, where certain debtors conveyed all their assets in trust for certain creditors, evidence of a parol agreement giving preference to certain of the creditors was held incompetent.[4]

A single Virginia case is out of harmony with these authorities. The case is *Brent* v. *Richards*,[5] where, under an absolute bill of sale for a slave, signed by the vendor, it was held that the vendor might prove an oral agreement whereby the slave might be repurchased under given circumstances. For a discussion of this case and its position relative to the other authorities in the State, see M. Lile's note in 5 VA. LAW REG. 317.

From this review of the situation in Virginia, it is apparent that the court was not absolutely bound by precedent in deciding the case of *Rector* v. *Hancock, supra.*

Decisions in other States develop two lines of authority. The one followed in Virginia recognizes no distinction between (1) an executory and (2) an executed contemporaneous agreement, but requires that in order to be admitted in evidence the agreement must have been executed, *and accepted by the payee as satisfaction of the written contract.* If so accepted, it is admitted as proof of accord and satisfaction. The other line of authorities distinguishes (1) an executory from (2) an executed oral agreement, and admits evidence of the latter, without proof of acceptance by way of accord and satisfaction.

Among the cases supporting the first of these views are *Doody* v. *Pierce*,[6] *Vradenburg* v. *Johnson*,[7] *Allen* v. *Thompson*.[8] These cases represent the conservative view, jealous of any new exception to the parol evidence rule, and fearful of the dangers inherent in any very general disregard of it. The inequity worked in special cases is considered insignificant when compared with the security insured to business agreements and the certainty afforded in some of the most solemn engagements of life.

Supporting the second view outlined above are *Howard* v. *Stratton*,[9] *Sanders* v. *Howe*,[10] *Tucker* v. *Tucker*,[11] *Patrick* v. *Petty*,[12]

[2] 13 Gratt. 705.
[3] 97 Va. 202, 33 S. E. 544.
[4] Percy *v.* Black, 110 Va. 129.
[5] 2 Gratt. 539.
[6] 9 Allen (Mass.) 141.
[7] 3 Neb. 326, 91 N. W. 496.
[8] 108 Ky. 476, 56 S. W. 823.
[9] 64 Cal. 487, 2 Pac. 263.
[10] 1 D. Chip. (Vt.) 365.
[11] 113 Ind. 272, 13 N. E. 710.
[12] 83 Ala. 420, 3 So. 779.

These decisions are less impressed with the sanctity of established common law principles, and admit an exception to the parol evidence rule which undoubtedly makes for reasonable results in many instances, and is declared to be in accord with the modern tendency of jurisprudence "to soften arbitrary rules which work injustice".

We see then that in deciding the recent case of *Rector* v. *Hancock, supra*, the court had the choice of two very respectable lines of authority. Whatever the merits of the case, it is of interest to the profession in Virginia to know that the court, free from binding precedent, adopted the conservative as opposed to the progressive view and upheld the parol evidence rule in all its ancient rigor.

T. L. P.